Karya Lagenda Sdn Bhd v Kejuteraan Bintai Kindenko Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–4 OF 2007(W)
AHMAD FAIRUZ CHIEF JUSTICE, HASHIM YUSOFF AND AZMEL FCJJ
6 SEPTEMBER 2008

Civil Procedure — Jurisdiction — Federal Court — Leave granted to consider questions of law — Whether Federal Court was prevented from reconsidering issue of whether leave ought to have been granted in the first place

Contract — Building contract — Bank guarantee or performance bond — Bank guarantee given by subcontractor to main contractor to guarantee performance of subcontract works — Delay in completion — Whether claim on bond must expressly state basis of claim or breach by subcontractor — Whether demand from main contractor sufficient to make demand on bond — Whether mutual termination of building contract absolves liability of bank under bank guarantee

The first respondent who was appointed the main contractor for the construction of a housing project (the project) engaged the appellant as a subcontractor for the project. The salient terms of the subcontract were the date of completion of the project, which was fixed as 30 June 2004, and the term relating to the ascertainment of the liquidated damages payable, which was made payable at the rate of RM30,000 per day. The second respondent was the bank which issued a banker's guarantee for RM2,075,700.94, on behalf of the appellant, to the first respondent. The said bank guarantee was in the form of a bond and guaranteed due performance of the underlying building contract. When the subcontract works were not completed on 30 June 2004, the first respondent granted the appellant an extension of time and revised the completion date to 22 September 2004. The bank guarantee was extended on 29 September 2004 to 31 December 2004. When the appellant failed to complete the subcontract works by the revised completion date of 22 September 2004 the first respondent issued a certificate of non-completion. The first respondent thereafter made three claims to the second respondent bank in respect of the bank guarantee but the second respondent rejected the claims on the basis that the underlying building contract had been terminated when the claim was made. The second respondent thereafter applied to the High Court by way of an interpleader

A proceeding to settle the dispute between the first respondent and the appellant and to ascertain the position it was to adopt in respect of the bank guarantee. In deciding whether the second respondent bank had to pay the amount stated in the bank guarantee the High Court had to determine whether the bank guarantee was a conditional or an unconditional bank B guarantee/bond and then consider whether the non-production of the original bank guarantee when making a demand to the bank affected the status of the first respondent's demand. Finally the High Court had to consider whether the wording in the first respondent's demand letter to the second respondent bank was sufficient as the basis of a demand made on a C bank guarantee. After examining the terms of the bank guarantee the High Court held that the bank guarantee in this case was an unconditional or 'on-demand' bond; that there was no requirement either in the underlying building contract or the bank guarantee that the original of the guarantee must be produced when the first respondent made a demand to the bank; and D that the wording in the first respondent's demand letter to the second respondent bank was sufficient and that it did not need to expressly state the basis upon which the demand was made. The appellant who was dissatisfied with the decision appealed to the Court of Appeal.

E The Court of Appeal came to the same conclusion as the High Court and held that the terms of the bank guarantee indicate that it is an unconditional and on-demand bank guarantee/bond. The Court of Appeal was also of the view that since the bank guarantee was an unconditional and on-demand bank guarantee, there was no necessity for a demand letter from the first respondent against the appellant asserting that the appellant had failed to F perform or breached the underlying building contract. The findings of the High Court and the Court of Appeal were also similar in respect of the other issues raised. When the Court of Appeal affirmed the decision of the High Court the appellant proceeded to apply for leave to appeal to the Federal Court on eight questions of law. At the hearing of the appeal only four G questions were raised for the consideration of the Federal Court. These questions required the court to consider, inter alia, whether the beneficiary of the bank guarantee or bond in this case had to expressly state that the contractor had failed to perform or had committed a breach of the underlying building contract in its demand in order for the demand to be valid; whether H the clause 'notwithstanding any contestation or protest by the contractor' in the bond precluded the contractor from raising an objection as to the validity of the on-demand bond; and whether the bond which guaranteed due performance of the underlying contract lapses once the contract was mutually terminated.

I

Held, dismissing the appeal with costs:

(1) In the instant case, applying the principle in decided cases, there was no

requirement that a beneficiary must assert clearly that the contractor had failed to perform or had committed a breach of the underlying contract. The on-demand guarantee or bank guarantee/bond in this case to which the first and second respondents were a party to was a distinct legal requirement from the underlying building contract between the appellant and the first respondent. Thus in case of such a guarantee or bond, the courts will not inquire into any breach in the underlying contract. Therefore once a valid demand is issued, as in the instant case, the second respondent bank must make payment to the first respondent. The bank had no right to object because the appellant's grievance were matters that must be adjudicated elsewhere (see paras 10-12).

(2) The clause 'notwithstanding any contestation or protest by the contractor' in the bond/guarantee clearly shows that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The implication of such a clause is that payment must be made upon receipt of a valid demand (see para 13).

(3) Although discussions and negotiations were entered into between the parties, ie the appellant and the first respondent, there was no agreement reached and as such no mutual determination of the underlying building contract. In any case, even if there was a mutual determination of the contract the second respondent was still not absolved of its liability under the bank guarantee. This was because cl 1 of the bank guarantee expressly provides that the second respondent can only be released 'by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction', which was not the case here (see para 14).

(4) Although leave had been granted on the four questions of law in this case, the Federal Court was not prevented from reconsidering the issue of whether leave ought to have been granted in the first place. The questions posed in this case were in fact questions of fact and not questions of law. In addition, the questions did not involve issues of importance that would be to public advantage. As such there was no necessity for the court to answer these questions (see para 15).

[Bahasa Malaysia summary

Responden pertama yang dilantik sebagai kontraktor utama dalam pembinaan projek perumahan (projek tersebut) mengambil perayu sebagai subkontraktor untuk projek tersebut. Terma-terma penting bagi subkontrak tersebut adalah tarikh penyempurnaan projek, yang telah ditetapkan pada 30 Jun 2004, dan terma berkaitan dengan pemastian ganti rugi jumlah

tertentu yang perlu dibayar, yang mana berjumlah pada kadar RM30,000 sehari. Responden kedua ialah bank yang mengeluarkan jaminan jurubank berjumlah RM2,075,700.94, bagi pihak perayu, kepada responden pertama. Jaminan bank tersebut dalam bentuk bon dan jaminan pelaksanaan wajar yang mendasari kontrak pembinaan tersebut. Apabila kerja-kerja subkontrak tersebut tidak siap pada 30 Jun 2004, responden pertama memberikan perlanjutan masa kepada perayu dan meminda tarikh penyempurnaan kepada 22 September 2004. Jaminan bank tersebut dilanjutkan dari 29 September 2004 hingga 31 Disember 2004. Apabila perayu gagal menyiapkan kerja-kerja subkontrak itu pada tarikh yang dipinda, iaitu pada 22 September 2004, responden pertama mengeluarkan perakuan tak siap. Responden pertama kemudiannya membuat tiga tuntutan terhadap responden kedua berkaitan dengan jaminan bank tersebut tetapi responden kedua menolak tuntutan tersebut atas alasan bahawa pendasaran kontrak pembinaan tersebut telah tamat apabila tuntutan itu dibuat. Responden kedua kemudiannya memohon ke Mahkamah Tinggi melalui prosiding interplider bagi menyelesaikan pertikaian antara responden pertama dan perayu dan juga untuk kepastian apakah langkah yang perlu diambil berkaitan dengan jaminan bank tersebut. Dalam memutuskan sama ada responden kedua perlu membayar jumlah yang dinyatakan dalam jaminan bank, Mahkamah Tinggi perlu menentukan sama ada jaminan bank tersebut adalah jaminan/bon bank bersyarat atau tidak bersyarat dan kemudian menimbangkan sama ada dalam ketiadaan salinan asal jaminan bank apabila membuat tuntutan kepada bank menjejaskan status tuntutan responden pertama. Akhir sekali, Mahkamah Tinggi perlu menimbangkan sama ada pernyataan surat tuntutan responden pertama kepada responden kedua adalah mencukupi sebagai asas tuntutan bagi suatu jaminan bank. Selepas menilai terma-terma jaminan bank, Mahkamah Tinggi memutuskan bahawa jaminan bank dalam kes ini merupakan bon tidak bersyarat atau bon 'on-demand'; bahawa tiada keperluan sama ada dalam pendasaran kontrak pembinaan mahupun jaminan bank bahawa salinan asal jaminan tersebut mesti dikemukakan apabila responden pertama membuat tuntutan terhadap bank tersebut; dan bahawa pernyataan surat tuntutan responden pertama kepada responden kedua adalah mencukupi dan surat itu tidak perlu menyatakan dengan jelas asas tuntutan itu dibuat. Perayu yang tidak berpuas hati dengan keputusan tersebut merayu ke Mahkamah Rayuan.

Mahkamah Rayuan juga mencapai kesimpulan yang sama dengan Mahkamah Tinggi dan memutuskan bahawa terma-terma jaminan bank menunjukkan bahawa jaminan itu merupakan jaminan/bon bank bersyarat dan 'on demand'. Mahkamah Rayuan juga berpendapat bahawa memandangkan jaminan bank tersebut merupakan jaminan bank bersyarat dan 'on demand', tidak perlu adanya surat tuntutan daripada responden pertama terhadap perayu menyatakan kegagalan atau perlanggaran perayu terhadap pendasaran kontrak pembinaan tersebut. Penemuan Mahkamah

Tinggi dan Mahkamah Rayuan juga sama berkaitan dengan isu-isu lain yang dibangkitkan. Apabila Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi, perayu memohon keizinan untuk merayu ke Mahkamah Persekutuan atas lapan persoalan undang-undang. Ketika pendengaran rayuan tersebut hanya empat persoalan yang dibangkitkan untuk pertimbangan Mahkamah Persekutuan. Persoalan-persoalan ini memerlukan Mahkamah Persekutuan memperhitungkan, inter alia, sama ada benefisiari jaminan bank atau bon dalam kes ini perlu menyatakan dengan jelas bahawa kontraktor tersebut gagal melaksanakan atau melanggar pendasaran kontrak pembinaan dalam tuntutannya agar tuntutannya sah; sama ada klausa 'walau apa pun pertikaian atau bantahan oleh kontraktor' dalam bon menghalang kontraktor membangkitkan apa-apa bantahan terhadap kesahan bon 'on demand'; dan sama ada bon yang menjamin perlaksanaan wajar pendasaran kontrak tersebut akan luput sebaik sahaja kontrak tersebut ditamatkan secara persetujuan bersama.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam kes ini, menggunapakai prinsip dalam kes-kes yang telah diputuskan, tiada keperluan bahawa benefisiari mesti menyatakan dengan jelas bahawa kontraktor tersebut gagal melaksanakan atau melanggar pendasaran kontrak tersebut. Jaminan 'on demand' atau jaminan/bon bank dalam kes ini yang mana responden pertama dan kedua terlibat merupakan kehendak perundangan yang nyata daripada pendasaran kontrak pembinaan antara perayu dan responden pertama. Maka, dalam kes jaminan atau bon sebegini, mahkamah tidak akan menyiasat tentang pelanggaran pendasaran kontrak tersebut. Oleh itu, sebaik sahaja tuntutan yang sah dikeluarkan, seperti dalam kes ini, responden kedua mestilah membayar kepada responden pertama. Bank tersebut tiada hak untuk membantah oleh sebab kilanan perayu merupakan hal perkara yang perlu ditentukan dengan saluran lain (lihat perenggan 10–12).

(2) Klausa 'notwithstanding any contestation or protest by the contractor' dalam bon/jaminan jelas menunjukkan bahawa bayaran hanya akan dibuat oleh bank sebaik surat tuntutan yang sah diterima. Adalah tidak relevan sama ada wujudnya bantahan atau pertikaian. Kesan klausa itu ialah pembayaran mesti dibuat apabila tuntutan yag sah diterima (lihat perenggan 13).

(3) Walaupun perbincangan dan perundingan dijalankan antara pihak-pihak, ie antara perayu dan responden pertama, tiada persetujuan dicapai. Oleh itu, tiada pemutusan bersama berkenaan pendasaran kontrak pembinaan tersebut. Walaupun ada pemutusan bersama tentang kontrak tersebut, responden kedua tetap tidak boleh bebas

daripada liabilitinya di bawah jaminan bank tersebut. Ini kerana klausa 1 jaminan bank menyatakan dengan jelas bahawa responden kedua hanya boleh dibebaskan dengan 'by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction', yang mana tidak berlaku dalam kes ini (lihat perenggan 14).

(4) Walaupun keizinan telah diberikan atas empat persoalan undang-undang dalam kes ini, Mahkamah Persekutuan tidak dihalang daripada mempertimbangkan isu sama ada keizinan seharusnya diberikan. Persoalan-persoalan yang dikemukakan di sini adalah persoalan fakta dan bukannya persoalan undang-undang. Tambahan pula persoalan-persoalan tersebut tidak melibatkan isu-isu penting, yang boleh memberi kelebihan kepada umum. Maka, mahkamah tidak perlu menjawab persoalan-persoalan tersebut (lihat perenggan 15).]

Notes

For cases on building contract in general, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2753–2955.

For cases on Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4411–4415.

Cases referred to

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (refd)

Hemis Interco BV Sdn Bhd v Syarikat Pembenaan Hashbudin (M) Sdn Bhd [1986] 1 MLJ 245 (refd)

Kerajaan Malaysia v South East Asia Insurance Bhd [2000] 5 MLJ 265 (refd)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prime Realty Sdn Bhd & Ors [2003] 3 MLJ 257 (refd)

Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449 (refd)

Appeal from: Civil Appeal No W-02–1184 of 2005 (Court of Appeal, Putrajaya)

Chen Mian Kuang (MK Chen & Leong) for the appellants.

Robert Lazaar (Rodney Gomez with him) (Shearn Delamore & Co) for the first respondent.

Ganesan Karuppannan (Stanislans Vetharayagam with him) (Muhammad Ganesan & Nazri) for the second respondent.

Ahmad Fairuz Chief Justice, Hashim Yusoff and Azmel FCJJ:

[1] The appellant in this case has been granted leave to appeal to the Federal Court on eight questions of law for consideration of the court.

However, during the hearing, four questions have been withdrawn leaving four questions of law to be considered by the court namely questions (ii), (iii), (vi) and (viii):

(ii) Do the terms of the performance bond (the bond) in question require the beneficiary of the bond to assert expressly and clearly in its demand thereon that the contractor had failed to perform or had committed a breach of the underlying contract between the contractor and the beneficiary in order for its demand to be valid?

(iii) Does the phrase 'we hereby submit our claim for the sum of RM2,075,700-94 as provided by the letter of guarantee' in the second defendant's demand on the bond, amount to an assertion that the first defendant had failed to perform or had committed a breach of the underlying contract between the first and second defendants?

(vi) Is the contractor precluded by the phrase 'notwithstanding any contestation or protest by the contractor' in the bond from raising an objection as to the validity of the demand on the bond or as to purpose of the bond having lapsed?

(viii) Does the purpose of a bond which guarantees due performance of the underlying contract lapse once the said contract is mutually terminated so that any demand made on the bond thereafter is valid?

[2] The first respondent was the main contractor for the construction of a housing project known as the Sri Rampai Project. He engaged the appellant as a subcontractor for the said project. Amongst others, the salient terms of the subcontract was that the time completion for the project was 30 June 2004 and liquidated and ascertained damages were payable at the rate of RM30,000 per day.

[3] The second respondent on behalf of the appellant issued a banker's guarantee dated 27 June 2003 for the sum of RM2,075,700.94 in favour of the first respondent. The said bank guarantee was extended on 29 September 2004 to 31 December 2004. The subcontract works were not completed by 30 June 2004. There was an extension of time issued to the appellant by the first respondent wherein the completion date was revised to 22 September 2004. A certificate of non-completion was issued by the first respondent on 19 November 2004 confirming that the appellant failed to complete the subcontract works by the revised completion date of 22 September 2004.

[4] However the bank guarantee was never extended beyond 31 December 2004. The first respondent then made three claims to the bank in respect of the bank guarantee. The second respondent had however rejected the claim on the basis that the contract had been terminated when the claim was made.

A The second respondent then filed an interpleader proceeding for the appellant and the first respondents to appear in court to settle the dispute and for the appellant and the first respondents to state their claim in case the second respondent had to pay them.

B **[5]** The learned High Court judge held that the second respondent had to pay the amount stated in the bank guarantee to the first respondent and that the appellant had to pay the costs to the first respondent and the second respondent. Dissatisfied, the appellant filed an appeal to the Court of Appeal. The Court of Appeal however affirmed the decision made by the High Court C judge and dismissed the appeal. Hence, this appeal to the Federal Court.

FINDINGS OF THE HIGH COURT

D **[6]** There were three issues considered by the High Court. The first issue was to determine whether the said bank guarantee was a conditional or an unconditional bank guarantee. For this issue, the learned judge said in his grounds of judgment:

> E The terms to be perused by the court are paras 1, 2, 4 and 5 of the said bank guarantee. The said terms, upon examination, are the same as the terms of the bank guarantee in the following cases: *Teknik Cekap*
>
> Therefore, the court holds that the bank guarantee in this case is also an unconditional bond or an on-demand bond.

F The second issue was the effect of not producing the original bank guarantee when making a demand to the bank. For this, the learned judge said:

> ... the court is of the view that this issue does not effect the status of the second defendant's demand. Nowhere in the said bank guarantee (or in the underlying G contract) is it stated that the original of the said bank guarantee must be produced ...

The third issue was to scrutinise the wording in the demand letter whether it clearly stated the basis upon which the said demand was made. For this the High Court judge decided:

H

> The words 'as provided by the letter of guarantee' clearly bear the meaning that the demand made by the second defendant is based on the said letter of guarantee. This is sufficient as the basis of a demand made on a bank guarantee.

I The High Court also further explained:

> the court also wishes to refer to the case of *Cygal* in which the Court of Appeal, after considering the bank guarantee which contains clauses similar to those in the present case, held that in such a bank guarantee, what was required to be done by the beneficiary to obtain payment under the said bank guarantee was merely to

make a written demand. That is all. It was not stated that the beneficiary has to expressly state the basis upon which the said demand was made.

FINDINGS OF THE COURT OF APPEAL

[7] The learned judges in the Court of Appeal also reached the same conclusion as the learned High Court judge:

> The learned High Court judge ruled that the bank guarantee dated 27 June 2003 issued by the plaintiff in favour of the second defendant is an unconditional guarantee or 'on demand bond' and all that is required to activate it is a written demand by the second defendant. The learned High Court judge rejected the argument of the necessity for the second defendant to prove default on the part of the first defendant in performance of the building contract. We are in agreement with the learned High Court judge. It is our judgment that the bank guarantee is a performance bond. Whether a performance bond is conditional or unconditional must depend on the terms of the bond itself ... It is our judgment the above clause is a clear indication that the bank guarantee is an unconditional and 'on demand' bank guarantee … We are of the view, since the bank guarantee being an unconditional and 'on demand' bank guarantee there is no necessity for the demand letter as contended by the first defendant to expressly assert that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court judge's finding on this issue is not erroneous. In fact the wordings of the bank guarantee in the present case is identical to the wordings of performance bond /bank guarantee that have come before the courts (*Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v Bank Bumiputra Malaysia Bhd* [1991] 2 MLJ 565, Cygal Bhd). In all these cases the courts have consistently held that such guarantee/bond is an 'unconditional bond' or an 'on demand bond'. We have no reason to interpret differently.

With regard to the issue about the original bank guarantee, the Court of Appeal judges also reached the same conclusion and in fact found that it is a non-issue.

[8] As earlier stated, four questions of law were posed for our consideration in this Appeal. We shall first consider question (ii) and (iii), focusing on the demand on the bond. The bank guarantee is an unconditional and an on demand performance bond/bank guarantee. Payment should therefore be effected by the second respondent notwithstanding any contestation by the appellant or the second respondent when a valid demand on the bank guarantee is made by the first respondent. All that is required is a demand simpliciter to trigger the obligation of the second respondent to make payment.

[9] In the case of *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449, the Court of Appeal held that:

A there need not be any precise words as provided for in the performance bond to be stated in the letter of demand but such a letter must at least assert in substance, the basis of the claim, which in that claim was damages for breach of contract.

B **[10]** Referring to the High Court decision of the instant case, the High Court held 'The words 'as provided by the letter of guarantee' clearly bear the meaning that the demand made by the second defendant is based on the said letter of guarantee. This is sufficient as the basis of a demand made on a bank guarantee'. In the Court of Appeal judgment of the instant case, it was held C that:

... We are of the view, since the bank guarantee being an unconditional and 'on demand' bank guarantee there is no necessity for the demand letter as contended by the first defendant to expressly state that the first defendant had failed to perform or breached the underlying building contract. Hence, the High Court D judge's finding on this issue is not erroneous.

Therefore it is clear that in the instant case, both the High Court and the Court of Appeal had applied the principle in *Teknik Cekap* where there is no requirement that a beneficiary must assert expressly and clearly that the E contractor had failed to perform or had committed a breach of the underlying contract. A demand is sufficient to trigger payment. We fully agree with the ruling made by the High Court and the Court of Appeal.

F **[11]** As regards to question (vi), we will focus on the issue of the right to be heard. An on-demand guarantee is independent of the underlying contract. It must be emphasised that the bank guarantee to which the first and second respondent are a party to, is a distinct legal document from the underlying contract which is an agreement between the appellant and the first respondent. The courts in an on demand type bond will not inquire into any G breach in the underlying contract. This principle can be found in the case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 where it was held that:

H Dealing further with the construction of the performance bond, since we found it was an on demand performance bond, this would, in our view, make the present performance bonds independent of any underlying concept ... On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud. Any argument or immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who I must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence of it.

[12] Therefore once a valid demand is issued the second respondent bank in the instant case must make payment to the first respondent because the

bank has no right to object since the appellant's grievances are matters that must be adjudicated elsewhere. This can be seen in cl 1 of the bank guarantee which reads as follows:

> (1) If the contractor (appellant), unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competence jurisdiction, shall in any respect fail to perform under the contractor commit any breach of his obligation thereunder, then the guarantor (second respondent) shall pay to the principal (first respondent) up to a total aggregate sum not exceeding the amount of TWO MILLION ONE HUNDRED TWENTY TWO THOUSAND SIX HUNDRED FORTY SEVEN AND SEN EIGHTY SEVEN ONLY (RM2,122,647-87) on the principal's demand notwithstanding any contestation of protest by the contractor or by the guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the aggregate sum of TWO MILLION ONE HUNDRED TWENTY TWO THOUSAND SIX HUNDRED FORTY SEVEN AND SEN EIGHTY SEVEN ONLY (RM2,122,647-87) and the guarantor's liability to pay the principal as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

[13] The clause 'notwithstanding any contestation or protest by the contractor' in the third question shows clearly that payments would only be made by the bank once a valid letter of demand is received and it is irrelevant whether there is any protest or contestation. The contractor's remedy is to sue in damages. The implication of such a clause is that payment must be made upon receipt of a valid demand. This principle can be seen in the case of *Kerajaan Malaysia v South East Asia Insurance Bhd* [2000] 5 MLJ 265 where it was held that:

> Paragraph 1 is so drafted that the guarantor shall become liable merely when demand is made by the government notwithstanding any contestation or protest by the contractor or the guarantor or by any third party ... Likewise, in the present case, the words 'notwithstanding any contestation or protest by the contractor or by ourselves or by any other third party' in para 1 above, do not alter the fact that the money is payable on a written demand under and pursuant to the said insurance guarantee. Therefore, on its true construction this insurance guarantee is an on demand performance bond.

Furthermore, a suit is still pending in the KL High Court suit No S5–22–457 of 2005 where all grievances of the appellant arising under the underlying

A contract is pending hearing and adjudication. Thus the contractor is precluded by the phrase from raising an objection as to the validity of the demand on the bond.

B **[14]** As regards question (viii), there was no mutual determination of the subcontract. Although discussions and negotiations were entered into between the parties, the same was unsuccessful and no agreement was reached. Even if there was a mutual determination, the second respondent is still not absolved of its liability under the bank guarantee as it can only be released by *any clause of the contract or by statute or by the decision of a tribunal* C *of competence jurisdiction* (cl 1 of the bank guarantee). Our instant case is similar to the case of *Hemis Interco BV Sdn Bhd v Syarikat Pembenaan Hashbudin (M) Sdn Bhd* [1986] 1 MLJ 245 where it was held:

D (2) the insurance company will have to pay out the amount guaranteed unless as provided in the agreement the subcontractor was relieved from performance by any clause of the contract or by statute or decision of a tribunal which is not the case here.

E **[15]** The respondent's counsel also submitted that even though leave had been granted on the four questions, yet as decided by the Federal Court in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prime Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, the Federal Court was not prevented from reconsidering the issue of whether leave ought to have been F granted in the first place. In that case, the respondent's counsel submitted similarly to the situation as in this case, where it was decided at p 277:

> Coming back to the questions formulated for determination by this court, it is our view that the questions do not involve a question of importance upon which G further argument and a decision of this court would be to public advantage. The questions merely relate to the set of facts in the appeal and the application of the settled principles of law as is plain from the judgment of the Court of Appeal. As such, they do not come within the ambit of s 96(a) of the CJA and therefore, there is no necessity or purpose for this court to answer the questions posed regardless of the fact that leave to appeal has in fact been granted at an earlier hearing.

H

We agree with learned counsel that the same approach needs to be taken by us in this case, as we also found that the questions posed are questions of fact and not questions of law. We also found that the questions 'do not involve a question of importance upon which further argument and a decision of this I court would be to public advantage'. There is no necessity or purpose for this court to answer the questions.

In the light of the circumstances as mentioned above, we are unanimous in deciding that the appeal be dismissed with costs. Deposit is to be given to the respondent to account for taxed costs.

Appeal dismissed with costs.

Reported by K Nesan